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On rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,
v.
CASEY TURNER,
Defendant and Appellant.

In re CASEY TURNER,
On Habeas Corpus.

A138649, A142829

(Alameda County
Super. Ct. No. 169011)

Defendant Casey Turner was 15 years old at the time of his charged offenses. He appeals from his conviction of one count of second degree murder and two counts of attempted murder, accompanied by sentence enhancements, for which he was sentenced to 84 years to life. In a previous published opinion, we affirmed the judgment, except that we modified his sentence to reflect that he would be entitled to a parole hearing after serving 25 years in prison (*Turner I*). We then granted Turner's petition for rehearing. In our non-published published opinion in *Turner II*, we remanded the matter to the trial court in light of *People v. Franklin* (2016) 63 Cal.4th 261, 283-284 (*Franklin*). Following our opinion in *Turner II*, we granted Turner's second petition for rehearing, raising a claim under recently enacted Proposition 57.

In this third iteration, we repeat nearly verbatim the portions of *Turner II* setting forth the facts of this case and rejecting, among other things, Turner's contentions that his

conviction should be reversed because the trial court committed instructional error and concluding Turner's challenge to the length of his sentence is moot because he now has a statutory right to become eligible for parole after serving no more than 25 years of his sentence. (*Franklin, supra,* 63 Cal.4th 261.) Finally, we conclude Turner is not entitled to a hearing regarding his fitness to be tried as an adult. We shall affirm the judgment, but, in accordance with *Franklin*, shall remand for the limited purpose of determining whether Turner has had an adequate opportunity to make a record of mitigating evidence that will be relevant at a future youth offender parole hearing.

I. EVIDENCE AT TRIAL

On March 27, 2010, 15-year-old Turner fired a gun at a group of young men, killing James Allen, and grazing Damonte Starks, and Burnett Raven. Turner knew the victims from high school. The incident took place in or near the parking lot of a local community market in downtown Oakland.

Some time prior to the shootings, Turner and Allen had gotten into a fight at school over a girl named Shay. Shay claimed that she was pregnant with Allen's child. However, according to Raven, Turner was telling people that Shay was "his woman." On the day of the shootings, Allen and several others, including his uncle or cousin Vito, Raven,[1] and Starks, had gotten together to make music at a friend's home recording studio. At some point, the group set out to find Turner to confront him about his involvement with Allen's "baby mama." Starks was with the group, but insisted that he had not left with them to "find" or to "hurt" Turner. According to Starks, the group took a bus to an area near 90th Avenue and Bancroft, where they planned to "go mess with some girls."

Starks and Raven told the police that the group got off the bus and walked over to two apartment complexes located between 92nd Avenue and 90th Avenue. Across the

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[1] Raven was unavailable to testify at trial due to an unrelated gunshot wound that had left him unconscious with dim prospects of surviving. (Evid. Code § 1291.) A video recording of his interview with the police was played and introduced into evidence. A transcript of the interview is included in the record on appeal. Additionally, Raven's preliminary hearing testimony was read into evidence.

street from the 90th Avenue side, was the Rowaid Market, also known as the "blue" market, which had an adjacent parking lot. The group entered through a gate on the 92nd Avenue side of the complexes and followed the walkway that ran between the complexes to the 90th Avenue side. As they approached the 90th Avenue gate, Starks heard gunshots and started running back along the walkway. It sounded like the shots were coming from across the street at the blue market. He began to run because he was afraid of being shot and killed. At some point, he heard a bullet hit the gate. As he ran, Starks was "grazed" by a bullet. He felt the impact of the bullet and almost fell, but he kept running. Starks ran up 92nd Avenue and got on a bus. Later, he checked his clothing and found entry and exit holes in the upper left shoulder area of his hooded sweatshirt.

Starks remembered speaking to the police a couple of months after the shootings. He did not recall telling the police he had seen two individuals across the street just before the shooting began. Starks did not have a gun with him that day, and he did not see Allen with a gun. He remembered that as he was running away, he heard some shots that sounded "a little bit closer," but he did not know from where the shots were coming.

Raven denied that he left with the group to go to the 90th Avenue apartments. He claimed that he lied in his recorded police interview when he said that he and the group left together bound for the 90th Avenue apartments. Rather, Raven claimed that he arrived alone at the 90th Avenue apartments. He said he spent approximately 90 minutes to two hours with a girl (whose name he could not recall and who he had not seen since), and then left the building on the 90th Avenue side. Upon leaving the building, he saw Allen and the rest of the group he had been with earlier that day. On the witness stand, Raven denied that any words were exchanged among any members of the group when he first saw them on 90th Avenue. However, during his recorded police interview, Raven said: "James [Allen] and [Vito] was on the phone. Yeah, it was kind of, like, you could tell like, they was getting into it. And they was, like, James [Allen] was, like, he was about to kill Casey [Turner] 'cause Casey was messing with his baby mama. [Vito] was, like, 'Let's do it.' And then, I was–we was walking–I was walking out the gate, so–we could get back on the bus. So when I walked out the gate . . . Markus and Casey was

walking toward us from across the street."[2] In his police interview, Raven also said that, while he and the group were inside the apartment complex, he heard someone say, "I'm gonna kill Casey."

Raven saw Turner across the street in the parking lot of the blue market. Raven noticed that Turner was tying the hood of his jacket while holding a gun in his hand. In his recorded police interview, Raven said: "I seen Casey [Turner] throw his hood on, tie it up. And I was like, 'There go Casey right there.' And then right after that, Casey started shooting." Raven later did not recall making this statement at the scene or during his police interview. He explained that he was under the influence of marijuana at the time of his interview with the police.

Raven testified that as he reached the 90th Avenue gate, Allen was right behind him. Turner pointed the gun at Raven and started shooting. Raven ran back inside the gate. Allen ducked and tried to cover himself as he ran back inside the gate. Raven said Turner fired seven or eight shots. Raven "heard different guns" being shot. Raven did not know what Allen was doing at this point because Raven was too worried about getting out of the area. Raven did hear two or three gunshots coming from a direction closer to him. Although Raven testified that he did not know that Allen had a gun with him and he did not see him with a gun until after he saw him fall down, Raven initially told police that he saw Allen fire three shots from a chrome revolver. Raven insisted, however, that Turner fired first.

As Raven and Allen were running, Allen collapsed. Raven saw blood on Allen's shirt. Later, Raven realized that he had been grazed by a bullet there was a hole in his hooded sweatshirt and his back was stinging.

Rickeisha Glenn lived in one of the apartment complexes between 90th Avenue and 92nd Avenue. Around 2:00 p.m. on the day of the shootings, Glenn heard what sounded like fireworks coming from the 90th Avenue side of the complex; she also heard the sound of running. When she looked outside, she saw a person lying on the ground.

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[2] In his statement to the police, Raven said Turner had been with someone named "Markus."

When she went to check on the person, she saw blood coming from his mouth and he was unresponsive. She looked up and down the walkway that ran between the complexes. She saw three black males running through the 92nd Avenue gate. Glenn saw Turner running away from the 90th Avenue gate. Glenn knew Turner and saw him in the area on a regular basis. She said boys in the area frequently ran around recklessly with guns, acting if they were playing a game. Turner was one of those boys. Glenn later identified Turner in a photographic lineup.

Officer Patrick Mahanay of the Oakland Police Department participated in the investigation of the shootings. He recovered eight .25 caliber shell casings from the parking lot next to the blue market. The casings were found approximately 120 feet from the gate of the apartment complexes across the street. He found a nine millimeter shell casing in front of apartment 11, which was located across the street from the blue market. He also found a bullet hole in the exterior façade of apartment 11. Officer Mahanay found two strike marks on a wall next to the front door of a residence, which was consistent with shots being fired from inside the courtyard toward the market. He also documented a bullet hold that went through the wall of an apartment. The bullet penetrated another wall and could not be extracted. After officers finished searching the courtyard near the apartment with the bullet hole, a scratched and bent .380 caliber casing was discovered on the scene. Officer Mahanay thought this discovery was odd because the casing had not been previously found and it appeared to be old.

The parties stipulated that Allen died of a gunshot wound to the torso. The bullet entered the left front chest, passed through his heart, and was recovered on the left side of his back.

No firearm was ever recovered. The casings and bullets that were recovered from the scene were analyzed by criminalist Todd Weller of the Oakland Police Department. He examined ten shell casings and two bullets. Weller's analysis of the eight .25 caliber casings suggested that they were all fired from the same gun. Weller did not have a firearm that he could use to perform an eject pattern testing, which prevented him from opining as to the specific weapon used. For the other two casings, one a nine millimeter

Luger casing and the other a .380 caliber casing, Weller had nothing with which to compare them. Both bullets he analyzed were .25 caliber, which he concluded were fired from the same, unknown gun. Weller was unable to determine whether the .25 caliber bullets came from the .25 caliber casings. He further explained that a .25 caliber cartridge could be fired by a non-automatic handgun.

Sergeant Sean Fleming interviewed Starks in January 2011. In this interview, Starks told Sergeant Fleming that Raven, who also went by the name of Bigs, as well, as Vito, Vontay, Zay, and Skrilla, were present at the time Allen was shot. Starks said the shooting started from across the street, near the blue market, where he saw two individuals standing. Starks thought Allen had fired back about three times. Starks identified Turner in a photographic lineup.

Also in January 2011, Sergeant Fleming interviewed Raven. Raven said that Starks, also known as Little Bigs, Zay, Vontay, and Vito were with him at the time of the shootings. Zay, Vontay, and Vito declined to cooperate with the police. Raven told Sergeant Fleming that Turner started shooting first from the parking lot across the street, as Raven and the others were leaving the 90th Avenue gate. Raven said "everything was, like, unexpected, kind of." Allen started shooting back from behind the gate, firing his gun three times. During the exchange of gunfire, a bullet grazed Raven's back. Raven told Sergeant Fleming that he was unaware that Allen had a gun with him that day; he did not see Allen's gun, a chrome revolver, until after the shooting started. Raven reported that he had seen Allen and Turner at a mutual friend's house, just a day before the shootings, and thought they were getting along. Raven said there were "no problems at all" between Turner and Allen. Raven did not realize until they were walking through the apartment complex that Allen intended to confront Turner about the girl who said she was pregnant with Allen's child, but who Turner said was his girlfriend.

II. DISCUSSION

A. Self-Defense Instructions

Turner contends the court prejudicially erred in refusing to instruct the jury on the theories of imperfect self-defense and justifiable homicide based on self-defense.

Defense counsel asked the court to instruct the jury with, among other things, CALJIC Nos. 5.12 (justifiable homicide–lawful self-defense) and 5.17 (actual but unreasonable belief in need to defend self).

Turner maintains the evidence justified the self-defense instructions because it showed Allen "accompanied by five friends and armed with a revolver—set out to confront [Turner], over a dispute as to whether [Allen] or [Turner] was the father of a baby on the way." He further claims that "[j]ust before the shooting, [Allen], in an agitated state, spoke of killing [Turner]."

CALJIC No. 5.12 addressing justifiable homicide based on perfect self-defense, states: "The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing actually and reasonably believes: [¶] 1. That there is imminent danger that the other person will either kill [him] [her] or cause [him] [her] great bodily injury; and [¶] 2. That it is necessary under the circumstances for [him] [her] to use in self-defense force or means that might cause the death of the other person for the purpose of avoiding death or great bodily injury to [himself] [herself]. [¶] A bare fear of death or great bodily injury is not sufficient to justify a homicide. To justify taking the life of another in self-defense, the circumstances must be such as would excite the fears of a reasonable person placed in a similar position, and the party killing must act under the influence of those fears alone. The danger must be apparent, present, immediate and instantly dealt with, or must so appear at the time to the slayer as a reasonable person, and the killing must be done under a well-founded belief that it is necessary to save one's self from death or great bodily harm."

And, CALJIC No. 5.17, regarding imperfect self-defense provides as follows: "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter. [¶] As used in this instruction, an

"imminent" [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [¶] [However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] [her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] [her] adversary's [use of force], [attack] [or] [pursuit].]"

The trial judge refused to give the requested instructions, ruling that "[t]here is no substantial evidence to support" such instructions. Although the court denied Turner's request to include the self-defense instructions, defense counsel suggested during closing argument that Turner acted in self-defense because Allen threatened to kill Turner. Because we conclude the defense presented no evidence to support the giving of the requested instructions, Turner's claim fails.

Addressing a similar claim of instructional error, the California Supreme Court explained: "An unlawful killing involving either an intent to kill or a conscious disregard for life constitutes voluntary manslaughter, rather than murder, when the defendant acts upon an actual but unreasonable belief in the need for self-defense. [Citations.] In addition, a homicide is justifiable and noncriminal where the actor possessed both an actual and reasonable belief in the need to defend. [Citations.] In either case, 'the fear must be of imminent harm. "Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury.' " [Citations.] The trial court need not give [perfect or imperfect self-defense] instructions on request absent substantial evidence to support them." (*People v. Stitely* (2005) 35 Cal.4th 514, 551; see *People v. Manriquez* (2005) 37 Cal.4th 547, 581; *In re Christian S.* (1994) 7 Cal.4th 768, 783.) Where there is no evidence from which a jury could reasonably conclude a defendant had an actual or honest belief in the need to defend against imminent danger to himself or others, such instructions are properly refused. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1269; accord, *People v. Breverman* (1998) 19 Cal.4th 142, 162 [instructions on imperfect self-defense required where the evidence that the defendant was guilty only of that lesser offense is " 'substantial enough to merit [a jury's]

consideration' "; the existence of any evidence, no matter how weak, will not justify instructions on a lesser included offense]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [sua sponte instruction that defendant killed in unreasonable self-defense is not required when the evidence is " 'minimal and insubstantial' "].) On appeal, we apply a de novo standard of review. (*Manriquez, supra,* 37 Cal.4th at p. 581.)

Here, the evidence was insufficient to require the giving of either self-defense instruction. The record is devoid of evidence suggesting Turner shot Allen because he *actually* believed he was in *imminent* danger of being killed or seriously injured. At some time prior to the shootings, Turner and Allen had fought about which one of them had impregnated a girl from school. However, the day just before the shootings, it was reported that there were "no problems at all" between Turner and Allen. On the day of the shootings, it was reported that the altercation unfolded in an "unexpected" manner. Turner shot first and then Allen returned fire.

Turner maintains there was substantial evidence to give the requested instructions because just prior to the shootings, Allen, "in an agitated state spoke of killing [Turner]." Next, Raven called out, " 'There go [Turner] right there.' " According to Raven, "right after that, [Turner] started shooting."

Turner concedes that his failure to testify "complicates" the question of whether he heard Allen's "statement of homicidal intent" or Raven's subsequent declaration that Tuner was across the street. Nevertheless, he insists that "there was a plausible basis for the jury to conclude [Turner] did hear one or both of these statements, that he saw the group of six boys assembled across the street from him, that he knew [Allen] was looking to confront him, and that he saw [Raven] point him out to the group."
We disagree.

There is simply no basis for the jury to conclude that Turner heard the remarks by Allen and Vito. Raven said the comments were made *inside* the apartment complex, not outside. Moreover, Officer Mahanay testified that the .25 caliber shell casings he collected were located 120 feet from the 90th Avenue Gate. Also, there is no evidence that Turner saw a group of six boys assembled across the street from him. Raven

testified that Turner started shooting at him as soon as he left the 90th Avenue gate. Allen was directly behind Raven; both boys turned back and started to run back through the gate once the shooting started. Similarly, Starks started to run back down the walkway as soon as he heard the shooting. No evidence suggested that anyone other than Raven and Allen even stepped out of the gate; there was also no evidence that a group had assembled on the street in a threatening manner.

Given the state of the evidence, in which nothing suggests Allen posed an imminent danger to Turner's life or that he created an imminent risk inflicting great bodily harm to Turner, there is no evidence from which the jury can infer that to be the case, the subjective elements required for imperfect self-defense are lacking. We therefore conclude that the trial court correctly refused to instruct the jury on self-defense.

B. Kill Zone Instruction and Sufficiency of the Evidence to Support the Attempted Murder Convictions

Turner argues that the trial court erred in giving a kill zone instruction because it was not supported by substantial evidence and, in any case, misstated the law.[3] The jury was instructed on attempted murder pursuant to CALJIC No. 8.66, which states in pertinent part: "In order to prove attempted murder, each of the following elements must be proved: [¶] 1.) A direct but ineffectual act was done by one person towards killing another human being; and [¶] 2. The person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being."

The jury was also instructed on the kill zone theory of attempted murder with CALJIC No. 8.66.1, entitled "Concurrent Intent." That instruction tells the jury: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a

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[3] Because Turner's claims on these issues are without merit, we need not consider the Attorney General's contention that Turner's objections were forfeited below and whether such forfeiture would constitute ineffective assistance of counsel.

primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim either as a primary target or as someone within the kill zone or zone of risk is an issue to be decided by you."[4]

1. Law

A conviction for attempted murder requires proof that the defendant intended to kill the victim and a direct but ineffectual act toward accomplishing that goal. (*People v. Perez* (2010) 50 Cal.4th 222, 229.) Our Supreme Court has described the critical distinction between the mental states required for attempted murder and murder: "Attempted murder requires express malice, i.e., intent to kill. Implied malice—a conscious disregard for life—suffices for murder but not attempted murder." (*People v. Stone* (2009) 46 Cal.4th 131, 139-140 (*Stone*); *People v. Bland* (2002) 28 Cal.4th 313, 327-328 (*Bland*).)

When a defendant is charged with attempting to kill multiple victims, guilt must be determined separately for each alleged victim. (*Stone, supra,* 46 Cal.4th at p. 141.) The doctrine of transferred intent, which permits a conviction for murder when a defendant intends to kill a particular victim but instead kills someone else, does not apply to attempted murder. (*Bland, supra,* 28 Cal.4th at pp. 327-328.) "To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim." (*Id.* at p. 328.)

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[4] In the CALCRIM set of jury instructions, the "kill zone" theory of attempted murder is found in CALCRIM No. 600, entitled "Attempted Murder." It is contained in an optional bracketed paragraph which provides: "[A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of [name of victim], the People must prove that the defendant not only intended to kill [name of primary target] but also either intended to kill [name of victim], or intended to kill everyone within the kill zone.]"

"[A] shooter may be convicted of multiple counts of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim." (*People v. Smith* (2005) 37 Cal.4th 733, 745-746 (*Smith*).) In such a scenario, the defendant is liable for attempted murder under a concurrent intent theory rather than transferred intent. (*Bland, supra,*28 Cal.4th at pp. 329-331.) "A kill zone, or concurrent intent, analysis focuses on (1) whether the fact finder can rationally infer from the type and extent of force employed in the defendant's attack on the primary target that the defendant intentionally created a zone of fatal harm, and (2) whether the nontargeted alleged attempted murder victim inhabited that zone of harm. [Citation.]" (*Smith, supra,* 37 Cal.4th at pp. 755-756 (dis. opn. of Werdegar, J.).)

The kill zone theory is not a legal doctrine requiring special jury instructions, but rather, "is simply a reasonable inference the jury may draw in a given case." (*Bland, supra,* 28 Cal.4th at p. 331., fn. 6; *People v. McCloud* (2012) 211 Cal.App.4th 788, 802.) Indeed "the Supreme Court has repeatedly explained that jury instructions on the kill zone theory are *never* required. (*Stone, supra,* 46 Cal.4th at pp. 137-138; *Smith, supra,* 37 Cal.4th at p. 746; *Bland, supra,* 28 Cal.4th at p. 331, fn.6 . . . .)" (*People v. McCloud, supra,* 211 Cal.App.4th at pp. 802-803.) Consequently, it is "*impossible* for a trial court to commit error, much less prejudicial error, by declining to give a kill zone instruction." (*People v. McCloud, supra,* 211 Cal.App.4th at p. 803.)

2. Substantial Evidence

Turner argues that the instruction was not supported by substantial evidence because there was no evidence he specifically intended to kill anyone. Specifically, as to Allen's death, the prosecutor asked the jury to convict him of second degree murder on an implied malice theory. Turner asserts that, at most, the evidence shows only that he shot at Allen, Starks, and Raven in a manner that subjected all three of them to the risk of fatal injury with conscious disregard. He posits that "if the 'kill zone' theory of attempted murder is rooted in the notion of *concurrent* intent, and [he] did not harbor the

specific intent to kill [Allen] (but rather shot him with a conscious disregard for life), then he also did not harbor the specific [intent] to kill [Starks] or [Raven], whom the prosecutor never claimed (and the evidence did not show) were the shooter's primary targets."

We are not convinced by Turner's argument that he did not have the requisite intent for attempted murder because he did not target a specific individual. A person can be guilty of attempted murder if the person purposely creates a kill zone intending to kill, not a specific target, but *anyone* present within the kill zone. (*Stone, supra*, 46 Cal.4th at p. 140 [describing, as an example, a terrorist who places a bomb on a commercial airliner intending to kill as many people as possible without knowing or caring who they are].) An identifiable primary victim is not necessary for the kill zone theory to apply as "[t]he mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being." (*Id.* at p. 134.)

Here, the prosecutor referred to evidence indicating that Turner acted with "a definite and unambiguous intent to kill" as he shot at Allen, Starks, and Burnett. Specifically, the prosecutor stated: "[W]e know from the witnesses that when the shots rang out, they started running down the corridor to get away. We know that James Allen was struck in the chest. We know that Damonte Starks and Burnett Raven were essentially grazed . . . That's how close the bullets are flying in this constricted area as these young people are down the [corridor]. It's not one shot, not two shots, not three shots. It's far more than that. [¶] A direct step indicates a definite and unambiguous intent to kill. Shooting at close range at a crowd of people who have almost no means of escape, you're running down a corridor and you're just praying the bullets miss as they're flying by."

Our Supreme Court observed that "the act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice. That the shooter had no particular motive for shooting the victim is not dispositive . . . . Nor is the circumstance that the bullet misses its mark or fails to prove lethal dispositive—the very act of firing a weapon

‘ “in a manner that could have inflicted a mortal wound had the bullet been on target” ’ is sufficient to support an inference of intent to kill. [Citation.]” (*Smith, supra,* 37 Cal.4th at p. 742.) The court held that evidence that the defendant “purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both. [Citations.]” (*Id.* at p. 743; see also *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 685 [“intent to kill two different victims can be inferred from evidence that the defendant fired a single shot at the two victims, both of whom were visible to the defendant”].)

Here, Turner fired numerous shots at three victims, who had virtually no means of escape. There was evidence from which the jury could find that Turner acted with express malice as to all three victims. Indeed, the prosecutor even noted, that as to Allen’s death, there was an argument to be made about first degree murder with respect to Turner “putting the hoodie on” before he began shooting, “the number of shots” he fired, and the fact that he “clos[ed] the distance to make sure [his] work” was done.” That the prosecutor ultimately believed that second degree murder was the “most just verdict” as to the death of Allen[5], did not preclude a finding that Turner created a kill zone, which encompassed all three victims.

Turner next argues that the jury was confused by the prosecutor’s argument because it asked for clarification of the definition of the mental state for attempted murder. Citing CALJIC No. 8.66.1, the trial court responded that a defendant must have a “specific intent to kill another human [being] and anyone else in the ‘zone of risk.’ ” Less than a half hour later, the jury returned its verdicts.

Here, any uncertainty on the jury’s part was dispelled when it asked for clarification and the court correctly responded to the jury’s inquiry. (*Bland, supra,* 28

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[5] It appears that the prosecutor based his opinion, in part, on the absence of any premeditation and deliberation; expressing his view that a first degree murder verdict was not appropriate, due to “how quickly this case happened.”

Cal.4th at p. 333.) Moreover, the jury was instructed with the lesser included offenses of assault with a deadly weapon or by means likely to produce great bodily injury, but convicted Turner of two counts of attempted murder, thus, demonstrating that it found he harbored the requisite specific intent to kill.

In sum, we conclude the trial correctly instructed the jury with CALJIC No. 8.66.1 on the kill zone theory. Substantial evidence supports Turner's attempted murder convictions under that theory.

3. Legal Challenge

Turner contends CALJIC No. 8.66.1's articulation of the kill zone theory is legally erroneous because it: 1) fails to adequately define the kill zone; 2) fails to adequately instruct that a defendant must have had a specific intent to kill; and 3) lessens the state's burden of proof, by "[p]ermitting the jury to convict so long as it finds an inference reasonable without requiring the jury to actually make that inference . . . ."[6]

In *People v. McCloud, supra,* 211 Cal.App.4th 788, the court criticized the use of the term "zone of risk" in CALJIC No. 8.66.1 as "misleading" and having "no basis in the law—neither the phrase 'zone of risk' nor even the word 'risk' appears anywhere in *Bland.*" (*People v. McCloud, supra,* 211 Cal.App.4th at p. 802, fn. 7.) (*People v.Bland* (2002) 28 Cal.4th 313 (*Bland*).) The court further explained that "[b]y referring repeatedly to a 'zone of risk,' the instruction suggests to the jury that a defendant can create a kill zone merely by subjecting individuals other than the primary target to a risk of fatal injury. . . . [T]hat is not correct." (*Ibid.*) Here, however, the jury was also instructed repeatedly on the requirement of intent and specific intent (see CALJIC No. 8.66 [in order to prove attempted murder, "a specific intent kill . . . another human being" must be established), including in the challenged instruction ("[w]hether a perpetrator

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[6] The California Supreme Court granted review of the case on which Turner primarily relies for his argument, *People v. Sek* (2015) 235 Cal.App.4th 1388. (Review granted July 22, 2015, S226721.) The court deferred further action in *People v. Sek* "pending consideration and disposition in a related issue in *People v. Canizales*, [review granted Nov. 19, 2014,] S221958." (Supreme Ct. Minutes, July 22, 2015, p. 1187; see *People v. Sek, supra*, 235 Cal.App.4th 1388, review granted July 22, 2015, S226721.)

actually intended to kill the victim either as a primary target or as someone within the kill zone or zone of risk is an issue to be decided by you[,]" italics added.) Reading the instructions as a whole, CALJIC No. 8.66.1 did not tell the jury that they need not conclude that Turner intended to kill both victims. (See *People v. Delgado* (2017) 2 Cal.5th 544, 573-574.)

Moreover, contrary to Turner's suggestion, nothing in CALJIC No. 8.66.1 is "incompatible with the fundamental constitutional requirement of proof beyond a reasonable doubt." Turner takes issue with the following sentence: "The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity." (CALJIC No. 8.66.1.) According to Turner, the instruction impermissibly allows the jury to convict so long as it finds an inference reasonable without requiring the jury to actually make that reasonable inference. We disagree.

The challenged language comes from *Bland, supra,* 28 Cal.4th at page 329, where our supreme court, in articulating the difference between transferred intent and concurrent intent, explained: " The conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them . . . [¶] [A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within . . . the 'kill zone.' 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an

explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. *Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.'* [Citation.]" (*Bland, supra,* 28 Cal.4th at pp. 320-330, italics added.)

Consistent with *Bland, supra,* 28 Cal.4th 1388, CALJIC No. 8.66.1 tells the jury that "the intent is concurrent when the nature and scope of the attack . . . are such that it is reasonable to infer the perpetrator intended to kill the primary victim by skilling everyone in that victim's vicinity." Nothing in the plain language tells the jury that the intent is concurrent based on the mere possibility that the perpetrator harbored that intent. Moreover, the jury was properly instructed regarding the presumption of innocence and, the prosecutor's burden of proving guilt by a reasonable doubt (CALJIC No. 2.90), as well as the requisite specific intent for attempted murder (CALJIC No. 8.66). The jurors were also instructed to disregard any instructions they deemed not applicable based on the facts (CALJIC No. 17.31). Jurors are presumed to follow the instructions that are given. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Turner fired a numerous shots at three victims, killing one and narrowly missing the other two. Substantial evidence establishes intended to kill Starks and Raven by "[s]hooting at close range at a crowd of people who have almost no means of escape . . . ." Turner's actions demonstrate that he took a direct but ineffectual step in intending to kill Starks and Raven. (See e.g., *People v. Perez, supra,* 50 Cal.4th at p. 229.)

Therefore, even if the trial court erred by instructing the jury with CALJIC No. 8.66.1, no prejudice resulted. We presume the jury based its convictions on a theory supported by the evidence, and there is no affirmative indication that the jury found Turner guilty solely on a mere possibility that he harbored concurrent intent to kill under a zone of risk theory. (*People v. Perez* (2005) 35 Cal.4th 1219, 1233.)

C. Cruel and Unusual Punishment Under the Eighth Amendment

Relying on *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*), *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), and *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), Turner, who was 15 years old at the time the murder and attempted murders were committed, contends that his sentence of 84 years-to-life, is the functional equivalent of a sentence of life without parole, and violates his rights to be free from cruel and unusual punishment under the Eighth Amendment. He further claims on direct appeal and in his consolidated petition for writ of habeas corpus that his defense counsel rendered ineffective assistance by failing to object to the sentencing and by failing to offer readily available mitigating evidence.

The Attorney General asserts that Turner forfeited the challenge to his sentence because he failed to object in the trial court. The Attorney General further adds that Senate Bill 260 (Sen. Bill 260), which enacted section 3051, cures any defect in Turner's sentence, and thus defense counsel was not ineffective for failing to object to the sentence imposed.

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." (See also Cal. Const., art. I, § 17 [proscribing the infliction of "cruel or unusual punishment"].) This restriction proscribes punishment that it is grossly disproportionate to the offender's culpability. (U.S. Const., 8th Amend.) In the context of juvenile offenders, because they "cannot with reliability be classified among the worst offenders," categorical rules have developed to prevent the imposition of disproportionate punishment. (*Roper v. Simmons* (2005) 543 U.S. 551, 569.)

In *Graham, supra,* 560 U.S. 48, the Supreme Court held a nonhomicide juvenile offender may not be sentenced to life without parole (hereafter LWOP). (*Id.* at p. 74.)

The Court required juvenile offenders be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" absent exceptional circumstances. (*Id.* at p. 75.)

After *Graham* came *Miller, supra,* 567 U.S. 460, in which the high court prohibited sentencing a juvenile homicide offender to mandatory LWOP and required the sentencing court to consider the mitigating qualities of youth. (*Miller, supra,* at pp. 477-479.) The court explained: The court explained: "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Id*. at pp. 477-478.) The court concluded: "Although we do not foreclose a sentencer's ability to [impose an LWOP sentence on a juvenile] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id*. at p. 480.)

Following *Graham* and *Miller,* in *Caballero, supra,* 55 Cal.4th 262, the California Supreme Court prohibited a term-of-years sentence that amounts to the "functional equivalent" of LWOP for juvenile nonhomicide offenders. (*Id.* at pp. 267-268.) The court explained the Eighth Amendment requires that at sentencing, a juvenile nonhomicide offender must be provided with "a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future," and "the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life,

including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison 'based on demonstrated maturity and rehabilitation.' [Citation.]" (*Id.* at pp. 268-269.)

In developing these rules, the courts relied on three fundamental differences between juveniles and adults to conclude juveniles are constitutionally different from adults for sentencing purposes. (*Graham, supra,* 560 U.S. at p. 68.) First, as compared to adults, "children have a ' "lack of maturity and an underdeveloped sense of responsibility," ' leading to recklessness, impulsivity, and heedless risk-taking. [Citation.] Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. [Citation.] And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' " (*Miller, supra,* 567 U.S. at p. 471.)

Because of these characteristics, " 'juvenile offenders cannot with reliability be classified among the worst offenders.' [Citation.] A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.' " (*Graham, supra,* 560 U.S. 48, 68.) Yet, "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." (*Id.* at p. 70.) Accordingly, "appropriate occasions for sentencing juveniles to [LWOP or its functional equivalent] will be uncommon." (*Miller, supra,* 567 U.S. at p. 479.)

In the wake of these cases, "[t]he issue of how long someone under the age of 18 may be sentenced to prison has been the subject of considerable judicial attention." (*People v. Perez* (2013) 214 Cal.App.4th 49, 55.) In response, the Legislature enacted

Senate Bill No. 260 to establish section 3051 addressing juvenile sentencing concerns, effective January 1, 2014.

Section 1 of Senate Bill 260 states in relevant part: "The Legislature finds and declares that, as stated by the United States Supreme Court in [*Miller*], 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control.' The Legislature recognizes that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in [*Caballero*] and the decisions of the United States Supreme Court in [*Graham*] and [*Miller*]." (Legis. Counsel's Dig., Sen. Bill No. 260 (2013–2014 Reg. Sess.) § 1, pp. 2–3.) The Legislature declared its intent "to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established." (*Ibid.*)

Section 3051 provides in pertinent part that subject to inapplicable exceptions, "[a] person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (former § 3051, subds. (b)(3), (h).) "The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release" and "take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of

youth, and any subsequent growth and increased maturity of the individual." (§ 3051, subds. (e), (f)(1).)

California Courts of Appeal have disagreed as to the effect of section 3051 vis-à-vis Eighth Amendment claims brought by juvenile offenders. Recently, however, our Supreme Court, in *Franklin, supra,* 63 Cal.4th 261, provided guidance on this issue. In *Franklin,* the defendant was 16 years old when he shot and killed another teenager. He was convicted of first degree murder and a firearm-discharge enhancement was found true. He received two consecutive 25-year-to-life sentences in prison. (*Franklin, supra,* 63 Cal.4th at p. 268.) Our Supreme Court granted review to answer two questions: "Does . . . section 3051 moot [the defendant's] constitutional challenge to his sentence by requiring that he receive a parole hearing during his 25th year of incarceration? If not, then does the state's sentencing scheme, which required the trial court to sentence [the defendant] to 50 years to life in prison for his crimes, violate *Miller's* prohibition against mandatory LWOP sentences for juveniles?" (*Ibid.*) *Franklin* held that sections 3051 and 4801 mooted the defendant's constitutional claim, making it unnecessary to answer the second question. (*Ibid.*) In so holding, the court explained: "Consistent with constitutional dictates, those statutes provide Franklin with the possibility of release after 25 years of imprisonment ([ ] § 3051, subd. (b)(3)) and require the Board of Parole Hearings (Board) to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity' (*id.,* § 4801, subd. (c))." (*Franklin, supra,* 63 Cal.4th at p. 268.) *Franklin* explained that section 3051 was enacted "explicitly to bring juvenile sentencing into conformity with *Graham*, *Miller,* and *Caballero*" and "reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve before becoming eligible for parole." (*Franklin, supra,* 63 Cal.4th at pp. 277-278.) The court held that sections 3051 and 3046 had "superseded the statutorily mandated sentences of inmates who, . . . committed their controlling offense before the age of [23]" (*Franklin, supra,* 63 Cal.4th at p. 278); section 3051 "effectively reforms the parole eligibility date of a juvenile offender's original sentence so that the longest possible term

of incarceration before parole eligibility is 25 years." (*Franklin, supra*, 63 Cal.4th at p. 281.) The court concluded, "In sum, the combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that Franklin is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because Franklin is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here. The Legislature's enactment of Senate Bill No. 260 has rendered moot Franklin's challenge to his original sentence under *Miller*." (*Franklin*, *supra*, 63 Cal.4th at pp. 279-280.)

The defendant in *Franklin* was not entitled to resentencing because "section 3051 has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required." (*Franklin*, *supra*, 63 Cal.4th at pp. 278-279.)

Although the court affirmed his sentence, because Franklin had been sentenced prior to *Miller* and *Caballero*, it remanded the matter to the trial court "for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.App.4th at p. 284.) It instructed: "If the trial court determines that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its

obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' (*Graham*, *supra*, 560 U.S. at p. 79)." (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

Like the defendant in *Franklin*, Turner is eligible by operation of law for parole consideration in his 25th year of incarceration, as he is not excluded for any reason enumerated in section 3051, subdivision (h). In light of the holding in *Franklin*, Turner's contention that his sentence constitutes cruel and unusual punishment is moot because he will have a meaningful opportunity for release within his lifetime under section 3051.

Turner, however, must be afforded an opportunity to present evidence of youth-related factors for consideration at his future youth offender parole hearing in his 25th year of incarceration. In *Franklin*, the defendant had been sentenced prior to *Miller* and *Caballero*, so it was unclear whether he had an opportunity to make a record of the youth-related factors to be presented at his youth offender parole hearing. (*Franklin*, *supra*, 63 Cal.4th at pp. 268-269.) Here, although Turner was sentenced after *Miller* and *Caballero*, the record establishes that he was not afforded a sufficient opportunity to make a record regarding his characteristics and circumstances at the time he opened fire on the victims. Specifically, defense counsel did not file a sentencing brief and submitted at the hearing without raising any objections to the probation officer's report. It is also unclear whether defense counsel even reviewed the probation officer's report with Turner. Following the approach in *Franklin*, Turner is entitled to the opportunity to present evidence that may be relevant at his future youth offender parole hearing.

D. Ineffective Assistance of Counsel Claim

In his writ of habeas corpus petition, Turner asserts his counsel was ineffective because he failed to argue his sentence was unconstitutional under *Graham*, *Miller*, and *Caballero*, and did not present readily available mitigating evidence of youth and inexperience.

"Under existing law, a defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most

advantageous disposition for his client may be found incompetent. [Citations.]" (*People v. Scott* (1994) 9 Cal.4th 331, 350-351.)

"A defendant claiming ineffective assistance of counsel must satisfy *Strickland's* [*Strickland v. Washington* (1984) 466 U.S. 668] two-part test requiring a showing of counsel's deficient performance and prejudice. [Citation.] As to deficient performance, a defendant 'must show that counsel's representation fell below an objective standard of reasonableness' measured against 'prevailing professional norms.' [Citation.] 'Judicial scrutiny of counsel's performance must be highly deferential,' a court must evaluate counsel's performance 'from counsel's perspective at the time' without [ ] 'the distorting effects of hindsight,' and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . .' [Citation.]" (*People v. Jacobs* (2013) 220 Cal.App.4th 67, 75 (*Jacobs*).)

Even under these highly deferential standards, defense counsel's performance in connection with the sentencing was deficient. As noted, defense counsel did not file a sentencing brief and submitted at the hearing without raising any objections to the probation officer's report. It is also unclear whether defense counsel even reviewed the probation officer's report with Turner. In essence, defense counsel did nothing to advocate on behalf of Turner regarding the sentencing in this case.

Of course, Turner must also demonstrate prejudice as a result. "The prejudice prong requires a defendant to establish that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Jacobs, supra,* 220 Cal.App.4th at p. 75.)

Turner argues that his case is "materially indistinguishable" from *People v. Speight* (2014) 227 Cal.App.4th 1229 (*Speight*), which held that a 17-year-old defendant was prejudiced by his attorney's failure to raise an Eighth Amendment objection to the length of the sentence imposed. (*Id.* at pp. 1233, 1248-1249.) Once again, section 3051 is relevant in our analysis of Turner's claim. *Speight* did not address the effect of section 3051 on the defendant's sentence or its application in assessing his claim of ineffective

assistance of counsel. In fact, there is no mention in *Speight* of section 3051 or Sen. Bill 260 at all. Accordingly, *Speight* is not dispositive of the issue on appeal.

Rather, we conclude that even if counsel had raised the challenge Turner now faults him for omitting, there is no possibility on the record presented on appeal he would have received in the trial court a sentence with an earlier parole eligibility date than under section 3051. Moreover, since Turner's sentence was not unconstitutional, it follows that his counsel was not ineffective for failing to argue that it was.

E. Probation Investigation Fee

At Turner's sentencing hearing, the trial court imposed a probation investigation fee of $710. Defense counsel asked if the court would consider waiving the fee "in view of the sentence." The court responded that it lacked the authority to waive the fee under section 1203.1b, but agreed to reduce the fee to $200.

Turner argues, and the Attorney General concedes, that the trial court erred by finding that it could not waive the probation investigation fee. "[S]ection 1203.1b, subdivision (a) requires the probation officer to determine a defendant's ability to pay all, or a portion of the reasonable cost of probation supervision and probation report preparation. The statute also requires the probation officer to inform the defendant he has a right to have the court determine his ability to pay and the payment amount. The defendant may waive the right to such a determination only by a knowing and intelligent waiver. ([] § 1203.1b, subd. (a).) Absent such a waiver, a court must conduct an evidentiary hearing. If the court determines the defendant is able to pay all or part of the costs, the court is required to set the amount of the payment and order the defendant to pay that amount to the county in a manner that is reasonable and compatible with the defendant's financial ability. ([] § 1203.1b, subd. (b).) The statute also provides for additional hearings during the period of probation to review the defendant's ability to pay the probation costs. ([] § 1203.1b, subd. (c).)" (*People v. Hall* (2002) 103 Cal.App.4th 889, 892-893.)

Although the probation officer recommended a $710 fee, there is no indication the probation officer determined Turner's ability to pay the fee. The probation officer noted

that 18-year old Turner had never been employed and had no verifiable income. It is unclear whether Turner was informed of his statutory right under section 1203.1b to have the court determine his ability to pay the fee, as required. (*People v. Hall, supra,* 103 Cal.App.4th at p. 893.) Moreover, there is no indication Turner waived his rights to a court hearing and judicial determination. The court did not conduct a hearing or receive evidence regarding Turner's financial ability to pay the probation investigation fee. The court made no finding regarding Turner's ability to pay all or part of the probation fees.

As the court in *People v. Hall, supra,* 103 Cal.App.4th 889 explained, "section 1203.1b does not specify the procedure a trial court should follow if it determines a defendant is unable to pay any part of his probation costs. The *obvious implication* from the language of . . . section 1203.1b, subdivision (b)(2), however, *is that the court should not order the defendant to pay any portion of the costs. This conclusion follows from the following language: 'if the court determines that the defendant has the ability to pay all or part of the costs, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county . . . .' ([], § 1203.1b, subd. (b)(2).) If the court determines the defendant lacks the ability to pay any part of the costs, it cannot, consistent with [ ] section 1203.1b, subdivision (b)(2), order the defendant to reimburse the county for any costs.*" (*People v. Hall, supra,* 103 Cal.App.4th at pp. 893-894, italics added.)

Here, the court ordered Turner to reimburse the county for his probation investigation fee in the amount of $200. The court's order was no doubt well-intentioned, but nonetheless erroneous. The trial court's order requiring Turner to pay $200 is stricken.

F. Proposition 57

Turner petitioned for rehearing on the ground that an initiative measure recently passed by the voters, "The Public Safety and Rehabilitation Act of 2016," commonly known as Proposition 57, applies retroactively to this case. We granted the petition for rehearing in order to consider this issue.

As relevant to this case, Proposition 57 eliminated the ability of a prosecuting attorney to file charges directly against a juvenile offender in adult court; instead, the People are authorized to file "a motion to transfer the minor from juvenile court to a court of criminal jurisdiction." (Welf. & Inst. Code, § 707, subd. (a)(1).) Upon receiving such a motion, the juvenile court determines whether the minor should be transferred to adult court based on certain statutorily factors. (Welf. & Inst. Code, § 707, subd. (a)(2); *People v. Superior Court* (*Lara*) (2017) 9 Cal.App.5th 753, 758; *People v. Cervantes* (2017) 9 Cal.App.5th 569, 595-597, review granted May 17, 2017, A10 (*Cervantes*).) These factors include the minor's degree of criminal sophistication, giving weight to the minor's age, maturity, intellectual capacity, physical, mental, and emotional health, and impetuosity, and the effect of familial, adult, or peer pressure; the minor's potential for rehabilitation before expiration of the juvenile court's jurisdiction; the minor's previous delinquent history and previous efforts to rehabilitate the minor; and the circumstances and gravity of the offense. (Welf. & Inst. Code, § 707, subd. (a)(2)(A)-(E).)

Turner argues that Proposition 57's requirement that a case against a minor be brought first in juvenile court and transferred to a court of criminal jurisdiction, or adult court, applies retroactively because it acts as a reduction in punishment. He therefore asks us to remand the matter for a fitness hearing at which the juvenile court would make a detailed assessment of the statutory factors. The Attorney General asserts that the revisions that Proposition 57 made to Welfare and Institutions Code section 707 do not apply retroactively to a conviction entered prior to the effective date of the amendment even if the conviction was not yet final. After the parties completed supplemental briefing on this issue, several cases, including one from this division, have discussed this fundamental disagreement and have reached conflicting conclusions. (*Cervantes, supra,* 9 Cal.App.5th 569, 580, review granted May 17, 2017, A140464 [affirmed convictions need not be reevaluated under new provisions, but fitness hearing under new provisions required as to charges reversed and remanded for new trial]; *People v. Mendoza* (2017) 10 Cal.App.5th 327, 331 [no retroactive application of Proposition 57];

but see *People v. Vela* (2017) 11 Cal.App.5th 68, 75-76, 79, 82 [conviction of minor conditionally reversed and remanded for juvenile transfer hearing under revised section 707 provisions; if juvenile court determines defendant not fit subject for treatment under juvenile court law, the conviction to be reinstated]; *People v. Marquez* (2017) 11 Cal.App.5th 816, 827-828 [agreeing with reasoning and conclusion in *Cervantes* and *Menodoza* and disagreeing with *Vela*].)

In support of his position, Turner relies on *In re Estrada* (1965) 63 Cal.2d 740, 742 (*Estrada*), which held that when a criminal statute is amended "after the prohibited act is committed, but before final judgment, by mitigating the punishment," the punishment provided by the amended statute should be imposed. This holding was based on the court's conclusion that "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Id.* at p. 745.) Turner argues that Proposition 57 effects a reduction in punishment and is subject to the rule of *Estrada.*

A different panel of this division recently rejected the argument that the rule of *Estrada* should apply so as to make Proposition 57's requirement for a fitness hearing retroactive. In *Cervantes*, this division explained that later Supreme Court cases "have limited *Estrada's* retroactivity exception to statutory changes that mitigate the penalty for a particular crime, which is not true of Prop 57." (*Cervantes, supra*, 9 Cal.App.5th at p. 600, review granted May 17, 2017, A140464.) Our Supreme Court in *People v. Brown* (2012) 54 Cal.4th 314, 324, explained that "*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3 [of the Penal Code], but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for *a particular criminal offense* is intended to apply to all nonfinal

judgments. [Citation.]" (Italics added.) Applying this rule, the high court concluded that a statute increasing the rate at which prisoners could earn credit for good behavior should not be applied retroactively because it did not "represent a judgment about the needs of the criminal law with respect to a particular criminal offense." (*Id.* at p. 325.)

In *Cervantes,* this division "[found] the rationale underlying *Estrada* equally inapplicable to the procedural changes implemented by Prop 57." (*Cervantes, supra*, 9 Cal.App.5th at p. 601, review granted May 17, 2017, A140464.) Although Proposition 57 will affect time spent in custody in some cases, it does not directly mitigate the penalty for a particular crime as required for retroactivity under *Estrada*. (*Cervantes*, at pp. 601-602, review granted May 17, 2017, A140464; accord *Mendoza; supra*, 10 Cal.App.5th at pp. 346-347; *Marquez, supra,*11 Cal.App.5th at pp. 827-828.) We remain of the view that the pertinent portions of Proposition 57 should not be applied retroactively. We therefore reject Turner's contention that he is entitled to have this matter remanded for a fitness hearing pursuant to Proposition 57. For the reasons discussed in *Cervantes*, we also reject Turner's contention that this result deprives him of his constitutional right to equal protection. (*Cervantes, supra*, 9 Cal.App.5th at p. 598, fn. 38; see also *Mendoza, supra*, 10 Cal.App.5th at p. 352, fn. 32.)

III. DISPOSITION

Our December 13, 2016 opinion is vacated. The matter is remanded to the trial court for the limited purpose of providing Turner an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801. (*Franklin. supra*, 63 Cal.4th at pp. 286-287.) Turner's sentence is modified to reflect he shall be entitled to a parole hearing after serving 25 years in prison. Additionally, the $200 probate investigation fee shall be stricken. The clerk of the trial court is directed to prepare a new abstract of judgment with these modifications and to send a certified copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed. The petition for writ of habeas corpus is denied.

_____
REARDON, ACTING P. J.

We concur:

_____
RIVERA, J.

_____
STREETER, J.

People v. Turner A138649; *In re Turner* A142829